No. 43215-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Thomas Miller,

Appellant.

Lewis County Superior Court Cause No. 11-1-00721-3

The Honorable Judge Richard Brosey

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ARGUMENT

I. THE TRIAL COURT VIOLATED MR. MILLER'S RIGHT TO AN OPEN AND PUBLIC TRIAL, AND HIS RIGHT TO BE PRESENT.

A. Experience and logic suggest that the closed proceedings in this case should have been open to the public.

Criminal cases must be tried openly and publicly. State v. Bone-Club, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); Presley v. Georgia, 558 U.S. 209, ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (per curiam). Proceedings to which the public trial right attaches may be closed only if the trial court enters appropriate findings following a five-step balancing process. Bone-Club, at 258-259.

The public trial right attaches to a particular proceeding when "experience and logic" show that the core values protected by the right are implicated. State v. Sublett, ___ Wash.2d ___, ___, ___ P.3d ___ (2012). A reviewing court first asks "'whether the place and process have historically been open to the press and general public,'" and second, "'whether public access plays a significant positive role in the functioning of the particular process in question.'" Id, at ___ (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7-8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)). If the place and process have historically been open

and if public access plays a significant positive role, the public trial right attaches and closure is improper unless justified under Bone-Club.

Here, the judge court met with counsel in chambers to discuss the applicability of RCW 63.21.010 and to permit argument on the parties' proposed jury instructions. RP (1/26/12) 22; RP (1/27/12 am) 137. As the Supreme Court noted, "[t]the resolution of legal issues is quite often accomplished during an adversarial proceeding..." Sublett, at ___.

The Supreme Court has yet to allocate the burden of proof when it comes to showing what occurred during a closed in camera proceeding. However, the Court has provided some guidance: where the record shows the likelihood of a closure (in the form of "the plain language of the trial court's ruling impos[ing] a closure"), the burden shifts to the state "to overcome the strong presumption" that a closure actually occurred. State v. Brightman, 155 Wash.2d 506, 516, 122 P.3d 150 (2005).

Similarly, the state should bear the burden of establishing that a closed proceeding does not implicate the core values of the open trial right. The prosecutor has an incentive to ensure that guilty verdicts are upheld, and is therefore the natural candidate to bear responsibility for putting on the record anything that transpired during a closed proceeding.[1]

[1] Similarly, if a closed proceeding does implicate the core values of the public trial right, the prosecution should ensure that the court considers the five Bone-Club factors.

Here, the record shows that two separate proceedings occurred behind closed doors. First, the parties talked about the applicability of RCW 63.21.010 at some point before the jury was sworn in. RP (1/26/12) 22. Second, the court told counsel "I want to see both of you in my chambers at 1:00 to go over instructions." RP (1/27/12 am) 61. Court resumed at approximately 1:30. RP (1/27/12 am) 62. Later, in raising Mr. Miller's continuing objection to the instructions denied by the court, the defense attorney made reference to the ruling from the in-chambers discussion. RP (3/1/12) 137.[2]

Although the parties were given the opportunity to put exceptions on the record, the transcript does not indicate what occurred in chambers. None of the arguments made by either party are preserved, nor are any statements made by the trial judge. Accordingly, the state failed to establish that the proceeding did not implicate the core values of the public trial right.

What can be gleaned from the sparse record of the closed proceedings in this case is that the parties disagreed over the applicability of RCW 63.21.010 and the instructions associated with that statute. RP (1/26/12) 22; RP (1/27/12 am) 61; RP (1/27/12 pm) 3-6. In other words,

[2] The attorney referred to a jury instruction ruling which denied a proposed defense instruction. This ruling appears nowhere in the trial court record, and must have occurred in the in-chambers jury instruction conference referenced by the court.

the closed hearings were adversarial. Cf Sublett, at ___ ("There was no showing here that the chambers discussion was adversarial in that it seems all sides agreed with the judge's response.")

Traditionally, adversarial proceedings have been open to the public. See, e.g., Press-Enterprise, at 13 (addressing preliminary hearing in California); United States v. Simone, 14 F.3d 833 (3d Cir. 1994) (granting public access to post-trial examination of juror for misconduct); United States v. Smith, 787 F.2d 111, 114 (3d Cir. 1986) (Smith I) (granting public access to transcripts of sidebar and in camera rulings); United States v. Criden, 675 F.2d 550, 552 (3d Cir. 1982) (granting public access to transcript of pretrial hearing held in camera).

By contrast, the public trial right is less likely to attach to nonadversarial matters. See, e.g., In re Search of Fair Finance, 692 F.3d 424, 430 (6th Cir. 2012) (refusing public access to search warrant documents); United States v. Gonzales, 150 F.3d 1246, 1257 (10th Cir. 1998) (refusing public access to indigent defendants' ex parte requests for public funds).

Thus, the "experience" prong of the Sublett test suggests that the in camera proceedings here should have been open to the public. This is especially true in light of the public's longstanding interest in the court's instructions on the law. See, e.g., Deming v. State, 235 Ind. 282, 286, 133

N.E.2d 51 (1956); Plunkett v. Appleton, 51 How.Pr. 469 (N.Y. 1876); State v. Smith, 6 R.I. 33, 36 (1859) (Smith II); Sargent v. Roberts, 18 Mass. 337, 349 (1823); Kirk v. State, 14 Ohio 511 (1846).

Similarly, the "logic" prong weights in favor of public access to in camera proceedings such as those conducted here. Open court proceedings are essential to proper functioning of the judicial system; this is especially true for hearings that have an adversarial tone, or for those that offer a possibility of prejudice to either party. Opening the courtroom doors to the public promotes public understanding of the judicial system, encourages fairness, provides an outlet for community sentiment, ensures public confidence that government (including the judiciary) is free from corruption, enhances the performance of participants, and discourages perjury. See Criden, at 556 (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)). Each of these benefits accrues when the public, the press, and any interested parties have a full opportunity to observe every aspect of a proceeding.

The in camera hearings here implicated the core values of the public trial right. Accordingly, the trial court's decision to close the courtroom violated both Mr. Miller's constitutional rights and those of the public. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const.

Article I, Sections 10 and 22; Bone-Club, supra. Accordingly, his convictions must be reversed and the case remanded for a new trial. Id.

B. The trial court violated Mr. Miller's right to be present by meeting with counsel in Mr. Miller's absence.

Mr. Miller stands on the argument set forth in Appellant's Opening Brief.

II. MR. MILLER'S CONVICTION ON COUNT II VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE OFFENSE.

Mr. Miller stands on the argument set forth in Appellant's Opening Brief.

III. THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE IN VIOLATION OF WASH. CONST. ARTICLE IV, SECTION 16.

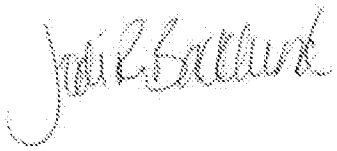
Mr. Miller stands on the argument set forth in Appellant's Opening Brief.

CONCLUSION

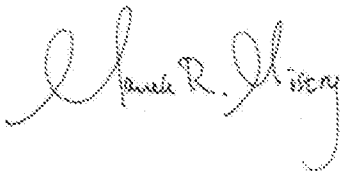
For the reasons outlined above and in the Appellant's Opening Brief, the convictions must be reversed.

Respectfully submitted on December 19, 2012,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Thomas Miller
2911 US Highway 12
Silver Creek, WA 98585

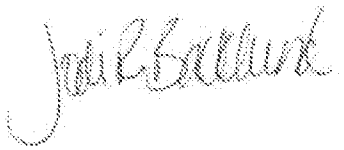
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 19, 2012.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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